STATE OF MICHIGAN

COURT OF APPEALS

NAACP - FLINT CHAPTER, JANICE O'NEAL, LILLIAN ROBINSON, and FLINT-GENESEE NEIGHBORHOOD COALITION a/k/a UNITED FOR ACTION,

Plaintiffs-Appellees/Cross-Appellants,

v

GOVERNOR OF MICHIGAN and DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendants-Appellants/Cross-Appellees.

and

GENESEE TOWNSHIP, GENESEE COUNTY SUPERVISOR, and GENESEE POWER STATION, LTD.,

Not Participating.

UNPUBLISHED

No. 205264
Genesee Circuit Court
LC No. 95-038228 CV

Before: Jansen, P.J., and Markey and O'Connell, JJ.

JANSEN, P.J. (concurring in part and dissenting in part).

I agree that the trial court's permanent injunction must be vacated because the trial court had no authority to issue it, and I agree that the trial court's orders dismissing plaintiffs' claims of race discrimination and violation of equal protection must also be affirmed.

I respectfully dissent from part IV of the majority's opinion regarding the amendment of the pleadings. Because of the significance of this issue to the jurisprudence of this state, I would reverse the trial court's order denying plaintiffs' motion to amend the pleadings, but remand to

allow plaintiffs to amend the pleadings to include claims under the Natural Resources and Environmental Protection Act (NREPA), MCL 324.5501 *et seq.;* MSA 13A.5501 *et seq.*, and the state constitution, Const 1963, art 4, § 51 and § 52, and for the parties to litigate these claims.

If a trial court denies a motion to amend, it should specifically state on the record the reasons for its decision. *Weymers v Khera*, 454 Mich 639, 659; 563 NW2d 647 (1997). In this case, the trial court did not give a particularized reason for denying the motion to amend. The failure of the trial court to specify one of the reasons for the denial of the motion to amend constitutes error requiring reversal unless such amendment would be futile. *Terhaar v Hoekwater*, 182 Mich App 747, 751; 452 NW2d 905 (1990). Here, defendants main point of contention at oral argument was that they were deprived of the opportunity to litigate the issue because it was raised sua sponte by the trial court. However, as noted by plaintiffs, they did not seek to add any new factual allegations, but merely to add new legal theories to conform to the evidence. Moreover, plaintiffs requested rather broad equitable relief in their second amended complaint, including to enjoin the operation of the incinerator and to require defendants to alter the permit granted to operate the incinerator. For these reasons, I would find that amendment of the pleadings would not be futile.

Further, a trial court is empowered to allow posttrial amendment of the pleadings to conform to the proofs, absent a showing of surprise or prejudice. *Gorelick v Dep't of State Hwys*, 127 Mich App 324, 338; 339 NW2d 635 (1983). For the reasons stated in the preceding paragraph, I would also find that defendants would not be surprised or prejudiced by allowing amendment of the pleadings. Moreover, the issue presented in this case has great importance to the safety and well-being of the people affected by the incinerator and is important to the jurisprudence of this state. Because of this, I would remand to allow plaintiffs to amend the pleadings to include the claims under the NREPA and the state constitution, and to allow the parties to fully litigate these claims. Although this relief may appear to be extraordinary, there is supporting authority in our Supreme Court and this Court to allow the parties to reopen the proofs. See, *Christy v Prestige Builders, Inc*, 415 Mich 684, 688, 698; 329 NW2d 748 (1982) (Our Supreme Court remanded the case to the trial court to permit amendment of the complaint to allege a separate cause of action not pleaded, submitted to the jury, or argued on appeal, and to retry the case to allow full development of the legal and factual issues); *Peoples Savings Bank v Stoddard*, 359 Mich 297, 325; 102 NW2d 777 (1960) (Where an issue was not pleaded, briefed, or argued at the hearing, but was first raised in the trial court's opinion after the close of proofs, the issue was one of substance and if amendment of the pleadings was to be allowed in the interest of justice, the defendants should have been given the opportunity to answer, reopen the proofs, and brief and argue the issue before the trial court's decision); *Westgate v Westgate*, 291 Mich 18, 24; 288 NW 860 (1939) (Courts have the discretion to permit the allowance of amendments and the right to reopen a case is discretionary with the trial court; thus, the trial court did not abuse its discretion in permitting the plaintiff to amend her complaint and reopen the proofs following the close of her proofs at trial); *Tafelski v Pettypool*, 15 Mich App 669, 674-675; 167 NW2d 349 (1969) (This Court remanded the case for a new trial based on the pleadings as amended, where the defendant alleged an entirely new affirmative defense during the trial, and a reopening of the discovery period under such terms and conditions as the trial court directed).

Accordingly, in the interest of fairness and justice, and because of the jurisprudential significance of the issue presented, I would follow this line of cases and remand to the trial court to permit plaintiffs to amend the pleadings to include their claims under the NREPA and the state constitution, and for the parties to fully litigate these claims in the trial court.

/s/ Kathleen Jansen